decision by the Court of Appeals for the Seventh Circuit which, in principle, conflicts with the determination made by the Court of Appeals for the Second Circuit in the instant proceeding. In *United States v. Parker*, 307 F. 2d 585, 589 (C.A. 7), the court ruled that it was not error to deny production, in a criminal prosecution under the Universal Military Training and Service Act, of a Department of Justice hearing officer's report which was not required *by statute or regulation* to be placed in a registrant's file. Obviously, had a statute or regulation required that the report be placed in the file and made available to the registrant, denial of its production at the trial would have been error.

In this case, however, the court below sustained the denial of production of an accountant's report made to the bankruptcy trustee. Under the specific terms of the Bankruptcy Act, Sections 47(a)(10) and 49, that report was open and available for inspection by any party in interest. By virtue of this statutory requirement, denial of production of the report—requested by the petitioner as a party in interest—was clearly erroneous and contrary to the principle recognized in the *Parker* decision of the Seventh Circuit.

2. The foregoing conflict as to the right to secure production of a document, required by statute to be available for inspection, is enough to justify plenary review by this Court. Rule 19(b). Added to this conflict between circuits is the very substantial conflict between the decision below and the relevant decisions of this Court.

Ex parte Uppercu, 239 U.S. 435, established the controlling principle that when a document is phys-

ically present within a jurisdiction (as is the case in this instance) "anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule." No such exception has been claimed or demonstrated here; no privilege has been asserted in terms of national security, public interest, confidential character or otherwise. The prosecution has done no more than indicate an unwillingness to have the document examined or used.

Subsequent decisions have expanded this principle in criminal cases so as to end any confidential character documents may possess where the prosecution is "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C.A. 2), quoted with approval in *Jencks* v. *United States*, 353 U.S. 657, 671. See also *Roviaro* v. *United States*, 353 U.S. 53, 62; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398-401; *Gordon* v. *United States*, 344 U.S. 414, 418-419.

And where the documents have been withheld from the defendant, so that he cannot determine their precise relevance or usefulness, this Court has recognized that "it is not for us to speculate whether they could have been utilized effectively." *Clancy* v. *United States*, 365 U.S. 312, 316. Whether such documents could be used as evidence or for impeachment purpose, as this Court held in *Scales* v. *United States*, 367 U.S. 203, 258, "is a decision which rests, of course, with the defendant himself."

Here the accountant's report could well have been vital to the defense. Since the bankrupt's records went no further than November 30, 1955; and since

the accountant's report covered the period at least until the end of 1955, and probably until March 1, 1956 (when the bankruptcy started and the terminal date of the indictment coverage), the report may well have indicated certain repayments of the "loans" to petitioner which could have exculpated him. But unless and until the accountant's report is produced and examined, in accordance with the mandates of the Bankruptcy Act, no one can say—as the court below purported to say—that the report would not have been admissible as evidence or that it was based on records otherwise available to petitioner.

The decision below is thus contrary to the *Upperco* principle and the dictates of fair judicial administration as enunciated in *Jencks*, *Clancy* and *Scales*. Moreover, the decision below is at war with the plain language of Sections 47(a)(10) and 49 of the Bankruptcy Act. The need for reviewing and resolving such conflicts, particularly where the liberty and reputation of a citizen are at stake, justifies the grant of certiorari.

CONCLUSION

For these reasons, as well as those expressed in the petition for a writ of certiorari, the order denying the petition should be vacated and a writ of certiorari should issue.

Respectfully submitted,

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November 30, 1962

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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